No. 89-1949

JUL 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD TILGHMAN, ET AL.,
Petitioners,

v.

ERIC KOLKHORST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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City Solicitor,
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After holding that a military reservist's request for leave need not be reasonable under 38 U.S.C. Section 2024(d) (a holding in conflict with three other courts of appeals) the Fourth Circuit went on to state in dicta: "[I]f we were to apply a reasonableness standard under Section 2024(d), we would find that Kolkhorst's request

for leave was entirely reasonable, and that the Department's arbitrary policy was not." (Petition for Certiorari, p. 24a).

Petitioner contends that a request for military leave need not be granted under 38 U.S.C. Section 2024(d) unless the request is reasonable from the perspective of both the employee-reservist and the employer. Petitioner also contends that there are triable issues of fact herein concerning the reasonableness of the employee-reservist's request for leave and the employer's response. In support of such contention, in the petition for certiorari Petitioner relies on affidavits it submitted in opposition to Respondent's motion for summary judgment, including, inter alia, the Affidavit of Police Commissioner Bishop L. Robinson.

In his brief in opposition to the petition for certiorari Respondent erroneously contends that Petitioner is raising this factual issue, as precluding summary judgment, for the "first time" in this Court; that Petitioner did not

present "facts" to the trial court, but, instead, according to Respondent, "relied upon conclusory statements of opinion, void of any factual or evidentiary basis." (Respondent's Brief in Opposition, p. 11).

So that there can be no doubt that Petitioner is not relying on "conclusory statements of opinion, void of any factual or evidentiary basis," Petitioner includes in the Appendix hereto portions of the Affidavit of Bishop L. Robinson which was filed in opposition to Respondent's motion for summary judgment.

Respectfully submitted,

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APPENDIX

AFFIDAVIT

STATE OF MARYLAND, CITY OF BALTIMORE, to wit:

I HEREBY CERTIFY that on this 30th day of October, 1987, before me, the subscriber, a notary public of the State of Maryland, in and for the County of Harford, personally appeared Bishop L. Robinson, who being of lawful age and competent to testify, gave oath as follows upon his personal knowledge:

That on July 1, 1984, I was appointed Commissioner of the Baltimore Police Department; at that time I reviewed the policy of my predecessor pertaining to requests to join the active military reserve and determined that said policy was reasonable; I, therefore, continued that policy during my tenure; that policy permitted one hundred (100) sworn members of the Baltimore Police Department to join the various active military reserve units; that the 100 person limit was approved by the Honorable

Roszel C. Thomsen as part of a settlement agreement in the case of Kundrat v. Pomerleau, et al., USDC, DMD., Civil Action No. T07902198, on April 24, 1981; that once a sworn member obtains a position on the list of 100, all subsequent requests for leaves of absence for military training are considered reasonable per se and are granted; that the 100 person figure was deemed to be reasonable based upon the size of the Department at the time and the corresponding hardship which resulted from the subsequent granting of military leave to those members on the list; that as of June 30, 1981, the Baltimore Police Department consisted of 2,968 sworn members (see Exhibit #1 attached hereto); that as of June 30, 1987, that number decreased to 2,925 (see Exhibit #1 attached hereto); that during the time period subsequent to March 1, 1985, the calls for police service increased by 9% (see Exhibit #2 attached hereto); that the majority of military leave taken by members on the 100 person list occurs

during the summer months, i.e. May, June, July, and August (see Exhibit #3 attached hereto); that the summer months are the prime months in which members of the Department also request vacation leave; that requests for vacation leave are determined on a seniority basis and predetermined on an annual basis during the month of February; that members on the 100 person list who request a leave of absence for military leave are given preference over vacation requests from other members of the Department; that during a reservist's absence due to military training, the squad/unit to which he is assigned may be required to work short-handed; that due to the limited manpower resources available, it is not possible to assign other members to cover the absent reservist's assignment; that it is not feasible to train replacement officers, as required by the Maryland Police Training Commission, at a cost to the Department of $3,787.00 per officer (see Exhibit #4 attached hereto) for a period of

26 weeks only to have that replacement officer work for a period of two to three weeks and then be terminated upon the absent reservist's return; . . . that any increase in the 100 person list would place an undue burden upon the Police Department in the event that a large scale mobilization or emergency call-up of the reservists were to occur, ...

S
BISHOP L. ROBINSON

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal the date and year first above written.

S
Diane L. Campisi,
Notary Public
My Commission expires
7/1/90.